

**TESTIMONY OF JAMES T. MARTIN, EXECUTIVE DIRECTOR OF UNITED  
SOUTHERN AND EASTERN TRIBES (USET)**

**Before**

**THE SENATE COMMITTEE OF INDIAN AFFAIRS**

**July 30, 2002**

**Regarding S. 2212, the Indian Trust Asset and Trust Fund  
Management and Reform Act of 2002**

Chairman Inouye, Vice Chairman Campbell, and distinguished members of the Senate Committee on Indian Affairs:

My name is James Martin. I am an enrolled member of the Poarch Band of Creek Indians, and serve as the Executive Director of United South and Eastern Tribes, Inc. (USET). I represent the tribes of the BIA Eastern Region on the Trust Reform Task Force (Task Force), and, along with Mr. Ross Swimmer, co-chair the Task Force Subcommittee on the EDS As-Is Business Process Modeling.

On behalf of the 24 member tribes of USET, I thank you for this opportunity to present our perspectives on Indian trust management reform. I would also like to express appreciation to the members of the Task Force (tribal and federal) for the accomplishments made to date toward the development of a structure that protects the government's fiduciary responsibility to the tribes and promotes accountability at all levels within the Department of Interior (DOI) and the Bureau of Indian Affairs (BIA). I also thank Senators McCain, Daschle and Johnson for introducing S.2212 as a mechanism to assist the Trust Reform Task Force in this monumental task.

USET brings together member tribes that operate under very different circumstances. USET member tribes vary widely in their population sizes, tribal government infrastructures, levels of economic development, and endowments of natural resources. We are deeply united, however, in our commitment to tribal sovereignty and the freedom to exercise that sovereignty through tribal self-determination. In the Eastern Region, tribes administer 95% of the government's federal Indian program responsibilities pursuant to agreements under the Indian Self-Determination and Education Assistance Act (ISDEAA) – testament to our commitment to tribal self-determination.

The tribes in the Eastern Region have engaged in frequent conversations to collectively develop approaches to trust management since Secretary Norton proposed restructuring the DOI's trust management functions last November. We first outlined our recommendations for the Secretary on February 1, when USET presented its alternative proposal to BITAM. I also testified before this Committee on February 26 at which time I outlined that proposal.

Earlier this month, the Eastern Region tribes met for a regional consultation to consider the Task Force's initial proposed options for reorganizing the DOI's Indian trust functions. The tribes in the Eastern Region unanimously and unequivocally asserted that regardless of what trust management structure is adopted, it must preserve the single point of decision-making authority at the local level for all Indian programs.

I want to emphasize this point from the outset, because the tribes in the Eastern Region insist that its significance should not be overlooked any longer. The tribes of the Eastern region have day-to-day experience showing that this aspect of the trust management system is working. Trust management reform must not impose new layers of bureaucracy on tribes at the Regional and Agency levels.

When it comes to effective delivery of the range of Indian trust services and the proper execution of fiduciary trust responsibilities, the current BIA structure that unites both trust accounting and trust services personnel at the Regional and Agency level assures that tribes have direct access and interaction with the decision-maker responsible for those programs. Based on the experience of tribes in the Eastern Region, this access is essential, whether those federal trust responsibilities are administered pursuant to self-determination contracts, self-governance compacts, or as direct services by the BIA. This structure provides a degree of "bottom-up" accountability that is as important to trust beneficiaries as the structure of the senior executive level is to the DOI. This point has been identified and articulated by USET tribes from the first day we learned of the Secretary's BITAM proposal.

We highlight Regional and Agency level access because we believe the functioning of the Eastern Region offers important lessons for the trust reform – notably, the active role of the tribes themselves in administering and carrying out Indian trust programs. In our Region, the large majority of tribes contract those functions through ISDEAA contracts, including one tribe in the Region that operates pursuant to a self-governance compact. The Eastern Regional Office provides services related to contract programs, negotiates agreements under the ISDEAA and administers Inherently Federal Functions (IFF).

At the local level we need to improve accountability and eliminate inefficiencies through improved standards, policies and procedures. A key problem is excessive delay in working through the various levels of the bureaucracy. But, to the extent tribes administer programs through 638 contracts and provided that the Regional Office is set up to offer tribes "one stop shopping" to contract those programs, the system works.

To date, the DOI representatives on the Task Force continue to demand additional layers of bureaucracy and duplicative authorities at the local level. Such a structure would impede tribal efforts by adding excessive, inefficient and costly administrative procedures to a system that is already overly bureaucratized. In order to maintain and expand tribal involvement and to enhance opportunities for tribes and Indian individuals to exercise "bottom-up" accountability, the federal government needs to streamline its trust asset management, not bureaucratize it.

### **Comments on Key Features of S. 2212**

**Senior Executive Leadership Structure.** The Task Force has reached a consensus on the Senior Executive Leadership structure consistent with that proposed by S. 2212. Both the Task Force and S. 2212 elevate the senior trust executive within the DOI. The senior trust executive reports directly to the Secretary and has direct line authority over the Assistant Secretary of Indian Affairs and over the Assistant Secretaries of each of the bureaus that perform trust functions and/or administer trust assets (for example, Mineral Mining Service, Bureau of Land Management, etc). This line of authority would serve to protect the full range of trust funds and assets managed by the federal government and institute the call for a single executive to insure that the trust obligations are met.

The Task Force has selected the concept of an Undersecretary rather than a Deputy Secretary based on the view that establishing an Undersecretary would not run into the political objections that might arise with proposing what appears to be an unprecedented second

Deputy Secretary within an executive Department.

To assure that trust policy is properly implemented at the Regional and Agency levels, USET has suggested that five Commissioner positions be established as civil service posts under the Assistant Secretary for Indian Affairs. [Please refer to the chart attached to my written testimony for reference]. The five commissioners (Education, Indian Services, Regional Operations, Trust Management Accounting, and Self-Determination) would have responsibility to ensure the proper execution of trust responsibilities at the Regional and Tribe/Agency level.

The Commissioner of Indian Services and the Commissioner of Trust Management would have quality assurance and oversight authority with respect to the trust functions pertaining to the Regional Director. This authority over trust functions at the Central Office to Regional Office level would parallel the Undersecretary's authority over trust functions pertaining to the Assistant Secretaries in the other DOI bureaus. Meanwhile, the line of authority over the operational responsibilities of the Regional Director would run from the Assistant Secretary to the Commissioner for Regional Operations. All 12 Regional Directors would answer directly to the Commissioner for Regional Operations. For the reasons I mentioned above, the Eastern Region tribes have urged that all trust services and resources remain at the regional level under the direction of a single line of authority.

Below the Regional Director is where the performance and authority over trust services and trust resources would divide, for example through a Deputy Regional Director for Trust Services and another for Trust Resource Management. The Agency Supervisor level would replicate this same structure – one single authority (the Agency Supervisor) with authority over ALL trust services and trust resources at the Agency level. Trust services would be separated from trust resources at the deputy supervisor level. Again, the key point is to have one individual decision-maker at each level of the bureaucracy to whom tribes have direct access. The purpose is to establish accountability driven by the beneficiaries, from the bottom up.

**Elevation of the Self-Determination policy.** An essential feature in elevating the senior trust executive as proposed by both the Task Force and S. 2212 involves the corresponding elevation of the policy of Indian Self-Determination. Both the Task Force and S. 2212 proposals place responsibility for self-determination contracting and compacting within the domain of the senior trust executive. While S. 2212 authorizes the Deputy Secretary to enter into self-determination contracts, the Task Force proposes the establishment of an Office of Self-Determination Policy in the office of the Undersecretary for Indian Affairs. At the strong request of the tribal representatives, the Task Force agreed that while policy formulation regarding self-determination shall be elevated to the Undersecretary level, the implementation of self-determination agreements must remain at the level most appropriate to ensure tribes the greatest access.

**Independent Oversight.** Both S. 2212 and the Trust Reform Task Force coincide in the view that establishing accountability for the DOI's trust management requires independent oversight. S. 2212 places the Deputy Secretary in charge of an Office of Trust Reform Implementation and Oversight to supervise and direct day-to-day activities regarding the trust responsibility. S. 2212 also provides for beneficiary involvement in that oversight effort through a board that would "provide advice on all matters within the jurisdiction of the Office of Trust Reform."

The Task Force has not reached consensus regarding the scope of powers to be delegated to an independent oversight commission. Both tribal and federal representatives agree that the commission should have powers to audit trust accounts, investigate allegations of accounting failures and agency action inconsistent with the trust responsibility, and analyze budgetary needs.

There also appears to be general agreement that the oversight commission would provide quality assurance and accountability through the Undersecretary for Indian Affairs and down the chain of command. Quality assurance is understood to be a trust management oversight function, not administration or implementation. Additionally, like S. 2212, the Task Force proposes a key role for the beneficiaries in the oversight body. For example, a majority of the members of the commission would be members of federally recognized tribes. In considering nominees, due consideration will be given to qualified individuals who have resources held in trust by the United States.

The tribal and the federal representatives disagree as to the nature of the commission's enforcement authority and regarding the delegation of rulemaking authority. I have agreed to co-chair a Task Force sub-workgroup to seek a resolution of these differences.

To sum up the differences, the federal representatives have suggested that the commission should exercise its enforcement authority by referring findings of non-compliance to the Treasury Department's Comptroller of the Currency for it to determine what sanctions and/or remedies to apply. Tribes wish to empower the commission with the range of enforcement mechanisms available to the Comptroller, so as to retain full discretion and authority to independently take enforcement action. As to rulemaking authority, the tribes have proposed that the one of the principal features of the commission would be rulemaking authority to promulgate trust management standards without Secretarial interference. The federal representatives have objected to having a commission assume any of the Secretary's rulemaking authority.

I hope that the Task Force can come back to you quickly with suggestions on how to proceed with legislation regarding the independent commission.

Let me also note that while S. 2212 retains and rebuilds the Office of the Special Trustee (OST), the view of the tribes of the Eastern Region is that the commission would

assume most of the functions now charged to the OST. We believe legislation will be required to provide for a transition of functions from the OST to the independent commission.

**Establishing Clear Trust Standards.** In testimony before this Committee last month, the Deputy Secretary of the Department of Interior stated that he was not able to define the standard governing the Indian trust responsibility. The tribal members of the Task Force and the Eastern Region Tribes urge this Committee that the time has come for Congress to establish statutory standards governing the trust responsibility. If the senior level official responsible for overseeing the trust responsibility is not able to articulate the standard, the DOI is not well positioned to execute that responsibility.

A starting point for legislating this definition can be found in the DOI's own policy manual which provides Department-wide *guidance* for carrying out the Secretary's trust responsibility. In Part 303, section 2.7, the Departmental Manual states its Trust Principles in the following terms: "it is the policy of the Department of the Interior to discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty." Those principles further provide that:

The proper discharge of the Secretary's trust responsibilities require that persons who manage Indian trust assets:

- A. Protect and preserve Indian trust assets from loss, damage, unlawful alienation, waste, and depletion;
- B. Assure that any management of Indian trust assets that the Secretary has an obligation to undertake promotes the interest of the beneficial owner and supports, to the extent it is consistent with the Secretary's trust responsibility, the beneficial owner's intended use of the assets.

And the list continues by spelling out eleven more trust duties. I refer the Committee to the Departmental Manual.

The tribal representatives on the Task Force believe that the Secretary's accountability for the trust responsibility would markedly improve if legislation modeled on this "guidance" in the Departmental Manual were enacted into law to provide a basic definition of the trust responsibility and the Secretary's corresponding duties to carry out that responsibility. As discussed above, we believe that rulemaking to further develop trust standards would be a significant role of the independent commission.

The tribes have discussed the possibility of permitting the development of separate standards governing tribal implementation of trust duties. The idea that tribal standards might be different from the Secretary's does not imply that the standards would be lower. Rather, the separate standards simply acknowledge that different policy considerations are at play. For instance, rather than a standard requiring that the resource be leased for its highest market value, a tribal standard may be to assure the resource's protection and preservation in order to fully reflect the asset's cultural or spiritual value. From the perspective of USET member tribes, the proper execution of the trust responsibility is achieving a balance that maximizes the utilization of trust resources and protects those trust resources for future generations.

**Assure Adequate Funding.** No structure can work without sufficient resources to drive it. Trust resource management programs, like trust service programs, have been underfunded for years. Lack of funding and personnel (particularly at the Regional level) account for a significant portion of the Secretary's failure to properly discharge the federal government's trust duties.

The amount of new money required for trust reform may be substantial. Such funds may well represent an investment in protecting the United States from future liability. Nevertheless, even though the need for trust reform is great and may require some redirection of resources, we ask this Committee to assure that trust reform funding not adversely affect existing programs.

We also ask the Committee, in reviewing the Task Force's proposal, to bear in mind that new structures and functions will replace existing offices within the DOI. I've already mentioned that the independent commission would assume many of the OST's functions and would eliminate that office. Resources currently available to the OST could then be made available to the oversight commission. Additionally, the President has proposed significant budgetary increases for trust reform. Where those additional dollars will flow, however, has not been fully discussed. We believe they should be targeted to the trust reform efforts currently being proposed by the Trust Reform Task Force, not to the structure developed last November to implement the Secretary's now withdrawn BITAM proposal.

Thank you very much. I look forward to answering any questions you may have for me.